88-212

Supreme Court, U.S.
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CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROSETTA N. DAVIS, ALMA C. OLIVER AND HAZEL PERRY,

Petitioners,

v.

STATE OF TENNESSEE, DEPARTMENT OF EMPLOYMENT SECURITY, ROBERT J. BIBLE, Commissioner of the State of Tennessee, Dept. of Employment Security; STATE OF TENNESSEE, DEPARTMENT OF PERSONNEL, WILLIAM C. KOCH, JR., Commissioner of the State of Tennessee Dept. of Personnel,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court of Appeals below erred in holding that use of the term "plaintiffs in the above action" in the notice of appeal failed to meet the specificity requirement of Rule 3(c) of the Federal Rules of Appellate Procedure for identifying petitioners as parties taking an appeal?

II. Whether the Court of Appeals below erred in holding that the use of the term "Minority Employees of the Tennessee Department of Employment Security, et al." was insufficient to satisfy the requirements of Rule 3(c), Fed. R. App. P., for an appeal by petitioners?

III. Whether the Court of Appeals erred in denying petitioners' motion to amend the notice of appeal, pursuant to 28 U.S.C. § 1653, in order to name the petitioners herein, or to suspend the

requirements of Rule (3) pursuant to Rule 2, Fed. R. App.P.?

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OCTOBER TERM, 1988

ROSETTA N. DAVIS, ALMA C. OLIVER AND HAZEL PERRY,

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vs.

STATE OF TENNESSEE, DEPARTMENT OF EMPLOYMENT SECURITY; ROBERT J. BIBLE, Commissioner of the State of Tennessee, Dept. of Employment Security; STATE OF TENNESSEE, DEPARTMENT OF PERSONNEL, WILLIAM C. KOCH, JR., Commissioner of the State of Tennessee Dept. of Personnel,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
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OPINIONS BELOW

The judgment and order of the district court, filed March 11, 1988, dismissing with prejudice petitioners' claims under 42 U.S.C. §§ 1981, 1983 and 1985, and under the Thirteenth and

Fourteenth Amendments, and dismissing petitioners' pendent state claims without prejudice, have Case No. 81-3114 in the United States District Court, Middle District of Tennessee, Nashville Division. See, Appendix herein.

The order and memorandum opinion of the district court dismissing petitioners' claims under Title VII of the Civil Rights Statute, 42 U.S.C. §§ 2000e et seq., were filed September 3, 1986, with Case No. 81-3114 in the United States District Court, Middle District of Tennessee, Nashville Division. See, Appendix herein.

The order of the Court of Appeals for the Sixth Circuit dismissing the appeal of petitioners consists of two pages, and is dated October 7, 1988. It has Case No. 88-5429 in the Court of Appeals. The February 28, 1989, order of the Court of Appeals denying petitioners' motion to amend and to suspend the rules, consists

of two pages, and has Case No. 88-5429. See, Appendix herein.

JURISDICTION OF THE COURT

The judgments of the Court of Appeals sought to be reviewed, were entered on October 7, 1988, and February 28, 1989. This Court has jurisdiction of the petition for a writ of certiorari pursuant to the terms of 28 U.S.C. § 1291.

STATUTES

28 U.S.C. § 1653: Defective allegations of jurisdiction may be amended upon terms, in the trial or appellate courts.

RULES

Rule 3(c), Fed. R. App. P.

The notice of appeal shall specify the party or parties taking the appeal.... An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

On March 6, 1961, individual petitioners Rosetta N. Davis, Alma C. Oliver and Hazel Perry, and plaintiff corporation Minority Employees of the Tennessee Department of Employment Security, Inc., commenced this employment discrimination action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, and 42 U.S.C. §§ 1981, 1983, 1985 and 1988, against respondent State of Tennessee Department of Employment Security, et al.

Petitioners Davis, Oliver and Perry alleged in the complaint that petitioners failed to receive job promotions in the respondent Tennessee Department of Employment Security as a result of respondents' unlawful, racially discriminatory promotional policies and procedures.

Plaintiff Minority Employees of the Tennessee Department of Employment Security, Inc., is not a petitioner here for a writ of certiorari. It was formed to assist minorities in being hired and promoted within respondent Tennessee Department of Employment Security.

Petitioners and plaintiff Minority Employees of the Tennessee Department of Employment Security, Inc., brought this action as a class action to prevent respondents from employing promotional policies and practices that unlawfully discriminated against the plaintiffs and members of the class.

On April 28, 1982, the District Court entered an order denying class certification. On September 3, 1986, the District Court entered an order dismissing plaintiffs' claims under Title VII, 42 U.S.C. §§ 2000e et seq.

On March 9, 1988, the District Court entered judgment dismissing, with prejudice, plaintiffs' claims under 42 U.S.C. §§ 1981, 1983 and 1985, and the Thirteenth and Fourteenth Amendments to the U. S. Constitution, and dismissing without prejudice petitioners' pendent state claims.

On April 11, 1988, a notice of appeal from the three orders of the District Court was filed by plaintiffs' attorneys.

The caption of the notice of appeal read as follows: "MINORITY EMPLOYEES OF THE TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, et al., plaintiffs, vs. TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, et al., defendants."

In the body of the notice of appeal there appeared the following recital:

> Now come plaintiffs in the above case and appeal to the United States Court of Appeals for the Sixth Circuit from the orders of the Court entered on 28 April 1982 denying the plaintiffs' motion for class

certification, 3 September 1986, dismissing plaintiffs' claims under Title VII of the Civil Rights Act of 1964, and 11 March 1988, dismissing plaintiffs' claims under 42 U.S.C. Sections 1981, 1983, and 1985 and the Thirteenth and Fourteenth Amendments to the Constitution of the United States. The Order of 11 March finalized the Orders of 28 April 1982 and 3 September 1986.

On June 24, 1988, this Court decided the case of Torres v. Oakland Scavenger Co., ___ U.S. ___, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988). Almost three weeks later, on July 14, 1988, plaintiffs served their appellants' brief of the appeal in the United States Court of Appeals for the Sixth Circuit.

Defendant-appellants moved to dismiss the individual petitioners Davis, Oliver and Perry from the appeal on the ground that they were not designated in the notice of appeal as required by this Court's holding in Torres v. Oakland Scavenger Co., supra.

On October 7, 1988, the Court of Appeals entered an order granting the motion to dismiss the individual petitioners from the appeal. The order of the Court of Appeals stated that:

> Rule 3(c), Fed.R.App.P. provides that the notice of appeal shall specify the party or parties taking the appeal. The use of the phrase "et al" utterly fails to provide the requisite notice. Failure to individually name a party in a notice of appeal constitutes failure of that party to appeal ... (citations omitted). The notice of appeal filed in the present case states that "plaintiffs in the above case ... appeal ..." and lists only as plaintiffs "Minority Employees of the Tennessee Department of Employment Security, et al." Because plaintiffs Davis, Oliver, and Perry are not designated in the notice of appeal as required by Torres,
>
> It is Ordered that the motion to dismissed is granted.

On October 21, 1988, the individual petitioners herein and plaintiff Minority Employees of the Tennessee Department of Employment Security, Inc., moved in the Court of Appeals, pursuant to Rule 2, Fed. R. App. P., and 28 U.S.C. §§ 1653 and

2071, for leave to amend their Notice of Appeal by typing petitioners' names Rosetta Davis, Alma Oliver and Hazel Perry on the face of the notice of appeal and moved to suspend the requirements of Rule 3(c), Fed. R. App. P., to permit the amendment.

Simultaneously with the motion to amend, the petitioners filed an amended notice of appeal. The caption of the amended notice of appeal read as follows: "Minority Employees of the Tennessee Department of Employment Security, Inc., Rosetta Davis, Alma Oliver, and Hazel Perry."

The body of the notice of appeal recited: "Now come plaintiffs in the above case, Minority Employees of the Tennessee Department of Employment Security, Inc., Rosetta Davis, Alma Oliver, and Hazel Perry, hereinafter plaintiffs, and appeal...."

On the same day, the Clerk's office of the U.S. Court of Appeals, by letter, informed counsel for petitioners that:

> This letter is to advise you that the order October 7, 1988 is not a final order that disposes of this appeal.
>
> The intent of the order was to grant the appellees' motion to dismiss certain parties, only.
>
> We are sorry for any confusion this may have caused....

On October 21, 1988, petitioners mailed an amended and corrected motion in which they requested (a) suspension of the rule requiring petitioners to be specifically designated in the notice of appeal, (b) leave to amend the notice of appeal to include the individual names of petitioners in the notice of appeal, (c) construing the original notice of appeal as if petitioners' names were included therein, and (d) adopting a method of enforcing Rule 3(c) other than dismissing petition-

ers' appeal. Petitioners requested, on October 26, rehearing en banc.

By order dated February 28, 1989, the Court of Appeals denied the motions to suspend the requirements of Rule 3(c) and to amend the notice of appeal.

With respect to the request to suspend Rule 3(c), the Court of Appeals held that the "requirements of Rule 3(c) ... that a notice of appeal shall specify the party or parties taking the appeal is jurisdictional in nature.... Jurisdictional requirements may not be waived."

Denying the motion to amend, the Court of Appeals held that it had "no authority to amend a notice of appeal to add additional parties after the time for taking the appeal has expired."

Oral argument on the remainder of the appeal by plaintiff Minority Employees of the Tennessee Department of Employment

Security, Inc., was held in the Court of Appeals on May 23, 1989.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL APPELLATE LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

In its order of October 7, 1988, the Court of Appeals for the Sixth Circuit decided a question of law, the application of which will result in widespread forfeiture of the right to appeal of plaintiffs who have expressed a clear intent to appeal. The court's ruling threatens the validity of appeals presently pending and appeals taken hereafter. The question decided by the court below is an important one which has not been, but which should be, settled by this Court.

The Court of Appeals held that its ruling was required by the holding in Torres v. Oakland Scavenger Co., supra.

It read this Court's decision in Torres v. Oakland Scavenger Co., supra, as standing for the propositions: (1) that the phrase "et al" does not identify any party not individually named; and (2) that "(f)ailure to individually name a party in a notice of appeal constitutes failure of that party to appeal."

Since petitioners' names were not individually listed in the notice of appeal and the caption of the notice only said "Minority Employees of the Tennessee Department of Employment Security, et al," the Court of Appeals held that Torres v. Oakland Scavenger Co., supra, construed as described above, required dismissal of petitioners' appeal.

Whether the use in a notice of appeal of the phrase "et al," meaning others, can ever be taken as an identification of other persons as specific parties to an appeal, and whether the failure to use the

individual names of persons in a notice of appeal represents a failure by those persons to take an appeal, are issues which this Court neither addressed nor decided in Torres v. Oakland Scavenger Co., supra.

In Torres v. Oakland Scavenger Co., supra, this Court simply held that a notice of appeal which included the names of 15 plaintiff-intervenors as appellants could not sensibly be construed as a notice of appeal also on behalf of a plaintiff-intervenor, i.e., Torres, whose name did not appear at all in the notice of appeal.

To be sure, the manner in which this Court initially framed the issue on review in Torres v. Oakland Scavenger Co., supra, may well have led the Court of Appeals below to conclude that the holding in Torres was broader than warranted by the facts of the case.

The Court began its opinion in Torres, supra, with the statement that "This case presents the question whether a federal appellate court has jurisdiction over a party who was not specified in the notice of appeal...." Id., 101 L.Ed.2d at 289. The Court's phraseology, "party who was not specified in the notice of appeal," however, was no less unambiguous than the phrase "(t)he notice of appeal shall specify the party or parties taking the appeal," used in Rule 3(c), which the Court was interpreting.

Both the phrase used by the Court and that of Rule 3(c) are open-ended. Neither determines the means which can be used to specify a party in a notice of appeal.

The Supreme Court's almost exact use of the phrase used in Rule 3(c), suggests that it did not intend, in Torres, supra, to spell out, in precise terms, the myriad ways in which a notice of appeal might be

used to specify the party taking the appeal.

This conclusion is further supported by the Court's statement in Torres, supra, that plaintiff failed to be specified in the notice of appeal, as required by Rule 3(c), because he "was never named or otherwise designated, however inartfully, in the notice of appeal." Id., 101 L.Ed.2d at 292. Had the Court intended to be more specific concerning the means by which an appellant could be otherwise designated, it could have achieved its purpose by making clear here what it meant by "otherwise designated."

The Court failed to make this clarification. Its use of the phrase "otherwise designated," must therefore be interpreted as an attempt by the Supreme Court to leave unresolved, for the present, the manner in which a party can

be specified in a notice of appeal other than by being named in it.

The court below, however, closed the door on this issue by holding that a party could not be specified in a notice of appeal unless the party's name was specifically included there.

Another issue left unresolved by this Court in Torres, supra, was whether the term "et al." could ever be used to aid a court in determining which parties were specified in a notice of appeal as taking an appeal.

In Torres, supra, this Court only went so far as to hold that the use of "et al." in a notice of appeal filed by 15 specified plaintiff-intervenors, was insufficient to give notice to the court and the appellees of an appeal by the 16th plaintiff-intervenor, i.e., Torres.

The court below, however, made a general ruling on the use of "et al." in

notices of appeal. It effectively held, in contradistinction to this Court's holding in Torres, supra, that the term "et al." could never be used, whether by itself or in conjunction with other terms such as "plaintiffs in the above case," to specify the parties in a notice of appeal taking an appeal, or to provide notice to the court and opposing party of the identities of the persons taking an appeal.

This ruling by the Court of Appeals thus constituted a decision on an important issue which has never been decided by this Court but which should be settled by this Court.

Other courts of appeals have reached the same result as the court below. See, Santos-Martinez v. Soto-Santiago, 863 F.2d 174 (1st Cir. 1988).

The decision below, however, conflicts with a decision of another panel of the Court of Appeals for the Sixth

Circuit in Ford v. Nicks, 866 F.2d 865 (6th Cir. 1989), where the panel held that a notice of appeal which specifically named one defendant, referred to the other defendants as "et al.," and which used the term "the defendants," as opposed to "defendants," met the requirement of specificity required by this Court in Torres, supra. For this reason, too, the Court should grant the writ of certiorari.

II.

IN HOLDING THAT PARTIES MUST BE INDIVIDUALLY NAMED IN A NOTICE OF APPEAL AND THAT "ET AL." CANNOT BE USED TO ASSIST IN IDENTIFYING PARTIES TAKING AN APPEAL, THE COURT BELOW DECIDED FEDERAL QUESTIONS IN CONFLICT WITH THIS COURT'S DECISIONS

This Court decided in Torres, supra, and other cases certain issues which are in direct conflict with the decision and judgment of the court below.

First, this Court held that a party could satisfy Rule 3(c)'s requirement by

"fil(ing) the functional equivalent of a notice of appeal." Id., 101 L.Ed.2d at 292. Second, the Court held that a party filed "the functional equivalent of a notice of appeal" if the party was "named or otherwise designated, however inartfully, in the notice of appeal." Id.

Third, the Court held that the specificity requirements of Rule 3(c) were met if the notice of appeal contained "some designation that gives fair notice of the specific individual or entity seeking to appeal." Id. The decision of the Court of Appeals below was in conflict with each of the Court's three holdings in Torres, supra.

The Court of Appeals rejected this Court's test of functionality altogether. No mention was made in the court's opinion of that test, and no inquiry was undertaken by the Court of Appeals to ascertain whether the petitioners here had, in fact,

filed the functional equivalent of a notice of appeal.

The Court of Appeals further gave short shrift to this Court's ruling that the notice of appeal should be examined to see if the party attempting to appeal was "named or otherwise designated, however inartfully, in the notice of appeal filed." The court made no such examination whatsoever other than to determine whether petitioners were individually named in the notice of appeal.

Instead of making the searching inquiry required by this Court's decision in Torres, supra, the Court of Appeals adopted a harsh, inflexible rule to decide the issue. It held that a party had to be individually named in the notice of appeal for the appeal with respect to that party to be good.

Since petitioners herein were not individually named in the notice of

appeal, or, in what the Court of Appeals took to be the same thing, were not individually listed by names in the notice of appeal, the court held that the requirements of Rule 3(c) were not met.

Furthermore, the Court of Appeals failed to follow, or mention, the holding of this Court in Torres, supra, that a party can satisfy the "specificity requirement of Rule 3(c)" by providing in the notice of appeal a "designation that gives fair notice of the specific individual or entity seeking appeal." Id., 202 L.Ed.2d at 292.

The court, however, performed no inquiry to ascertain what type of fair notice was provided by petitioners' designations in the notice of appeal, namely, the terms "plaintiffs in the above case" and "et al."

Rather, the court adhered to its rigid rule requiring the rejection of any

notice of appeal on behalf of any party who was not individually named in the notice of appeal. As a result, the Court's statement in Torres, supra, that the "specificity requirement of Rule 3(c) can be met by a "designation that gives fair notice of the specific individual or entity seeking to appeal," was rendered meaningless.

The Court of Appeals' ruling on this issue therefore clearly contradicts this Court's opinion in Torres, supra.

Overall, the Court of Appeals' ruling on these three issues amounts to a repudiation of this Court's admonition that courts of appeals, in resolving issues of compliance under Rule 3(c), should determine whether "in light of all the circumstances, the rule had been complied with." Torres, supra, 101 L.Ed.2d at 291, citing Foman v. Davis, 371 U.S. 178, 181 (1962). See, Houston v.

Lack, ___ U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 245 (1988).

The net effect of the Court of Appeals' rulings, taken together, was not only a refusal to determine if petitioners herein had, in fact, filed the functional equivalent of a notice of appeal, but also a specific refusal, as a matter of law, to consider whether the notice of appeal's simultaneous use of the terms "plaintiffs in the above case" and "Minority Employees of the Tennessee Department of Employment Security, et al.," as designations, satisfied the specificity requirement of Rule 3(c).

III.

THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL INTERPRETATION OF RULES AS TO REQUIRE THIS COURT'S SUPERVISION

Despite the statement in the notice of appeal that plainly says "Now come plaintiffs in the above case and appeal,"

the Court of Appeals held that only one plaintiff, namely, the Minority Employees of the Tennessee Department of Employment Security, Inc., had effectively appealed. It reached this odd conclusion despite the fact that the term "plaintiffs" occurring in the body of the notice of appeal was plural, and did not specifically mention the Minority Employees of the Tennessee Department of Employment Security, Inc.

Purporting to interpret Rule 3(c) and to follow this Court's decision in Torres, supra, the Court of Appeals ignored the body of the notice of appeal altogether, apparently on the supposition that the term "plaintiffs in the above case" did not constitute a name or designation of any kind.

The Court of Appeals believed that the opinion in Torres, supra, required it to disregard the use of "et al." in the caption, thereby leaving the Minority

Employees of the Tennessee Department of Employment Security, Inc., as the sole party individually named in the notice of appeal. This tortuous interpretation of the notice of appeal was thought to be required by Torres, supra.

Such a construction of the notice of appeal is so far a departure from the accepted and usual way of interpreting legal documents that this Court should exercise its power of supervision to correct the actions of the court below.

In interpreting the notice of appeal, the Court of Appeals should have heeded the opinion of Justice Holmes in Roschen v. Ward, 279 U.S. 722 (1929), which, though addressed to the strict construction rule for criminal statutes, is applicable here as well. Justice Holmes said: "We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon

against using common sense in construing laws as saying what they obviously mean." Id. at 728.

IV.

THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN HOLDING THAT THE DEFECT IN THE NOTICE OF APPEAL COULD NOT BE CURED PURSUANT TO AN AMENDMENT UNDER 28 U.S.C. § 1653 OR A SUSPENSION OF RULE 3(C) UNDER RULE 2, FED.R.APP.P.

In its order dated February 28, 1989, the Court of Appeals held that because the time requirement of Rule 3(c) was jurisdictional, it lacked authority to amend a notice of appeal, pursuant to 28 U.S.C. § 1653, to add parties after the time for taking the appeal had expired.

Whether a notice of appeal can be amended in this way, is an important issue of federal law which has not been, but should be, settled by this Court.

In its decision in Torres, supra, this Court completely overlooked the applicability of 28 U.S.C. § 1653. Moreover, because this Court held that the

time requirement of Rule 3(c) was jurisdictional, it apparently assumed that it therefore could not be waived or altered, or that a default under the rule in satisfying the requirement could not be cured.

But 28 U.S.C. § 1653 specifically provides that "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

A defective allegation in a notice of appeal -- such as a failure to name individually all plaintiffs appealing, or to refer only to "plaintiffs in the above case" -- can be cured under 28 U.S.C. § 1653 by simply amending the notice of appeal to supply the missing allegation.

Such an amendment should be effective for all purported appellants, at least where the amendment satisfies a requirement analogous to the requirement under Rule 15(c), Fed. R. Civ. P., for relating

back to the time of the original filing, i.e., the respondent in the appeal has received such notice of an appeal that he or she will not be prejudiced in defending on the merits, and knew, or should have known, that, but for a mistake concerning the identity of the proper party, the appeal would have included the purported appellant.

Permitting an amendment of the notice of appeal under 28 U.S.C. § 1653, with or without the suggested limitation derived from Rule 15(c), should be allowable under Rule 3(c). The court below, however, held that an amendment under 28 U.S.C. § 1653 was unauthorized.

This important issue should be settled by this Court. This Court can additionally consider whether Rule 2 can appropriately be used in conjunction with 28 U.S.C. § 1653 to effectuate proper

amendments to notices of appeal under Rule 3(c).

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the judgments below.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-5429

Minority Employees of the Tennessee Department of Employment Security, Incorporated;
c/o Leon Wilson, President,
Plaintiffs-Appellants,

Rosetta N. Davis;
Alma C. Carter;
Hazel Perry, M.S.
Plaintiffs,

v.

State of Tennessee, Department of Employment Security; Robert J. Bible, Commissioner of the State of Tennessee, Department of Employment Security; State of Tennessee, Department of Personnel; William C. Koch, Jr., Commissioner of the State of Tennessee Department of Personnel,
Defendants-Appellees.

FILED
FEB 28 1989
LEONARD GREEN, Clerk

ORDER

Before: MARTIN and RYAN, Circuit Judges; and POTTER, District Judge*

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*The Honorable John W. Potter, U. S. District Judge for the Northern District of Ohio, sitting by designation.

Appeal is taken from dismissal of this civil rights action. By order of October 7, 1988, this court dismissed as appellants the individual plaintiffs Davis, Oliver and Perry. Plaintiff now moves 1) to suspend the requirements of Rule 3(c), Fed. R. App. P., and 2) to amend the notice of appeal. Defendants oppose both motions.

The requirement of Rule 3(c), Fed. R. App. P., that a notice of appeal shall specify the party or parties taking the appeal is jurisdictional in nature. Torres v. Oakland Scavenger Co., 108 S.Ct. 2405 (1988). Jurisdictional requirements may not be waived. Id. at 2409; see also Hinsdale v. Farmers Nat'l Bank & Trust Co., 823 F.2d 993 (6th Cir. 1987).

Further, we have no authority to amend a notice of appeal to add additional parties after the time for taking the

appeal has expired. Rule 26(b), Fed. R. Civ. P.; see also Trinidad Corp. v. Marv, 781 F.2d 136 (9th Cir. 1986) (per curiam); Cook and Sons Equipment, Inc. v. Killen, 277 F.2d 607 (9th Cir. 1960).

It is ORDERED that plaintiff's motion to suspend the requirements of Rule 3(c), Fed. R.
Civ. P., and motion to amend the notice of appeal are denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-5429

Minority Employees of the Tennessee Department of Employment Security, Incorporated, et al.,

Plaintiff-Appellants,

Hazel Perry, M.S.

Plaintiff,

vs.

State of Tennessee, Department of Employment Security; et al.,

Defendants-Appellees.

FILED
OCT 7 1988
LEONARD GREEN, Clerk

ORDER

Before KENNEDY and KRUPANSKY, Circuit Judges; and EDWARDS, Senior Circuit Judge

This appeal is taken from the dismissal of this civil rights action. The defendants now move to dismiss plaintiffs Davis, Oliver and Perry from this appeal pursuant to Torres v. Oakland

Scavenger Co., ___ U.S. ___, 108 S.Ct. 2405 (June 24, 1988), on grounds that those plaintiffs were not designated in the notice of appeal. The plaintiffs oppose the motion to dismiss.

Rule 3(c), Fed. R. App. P., provides that the notice of appeal shall specify the party or parties taking the appeal. The use of the phrase "et al" utterly fails to provide the requisite notice. Failure to individually name a party in a notice of appeal constitutes failure of that party to appeal. Torres v. Oakland Scavenger Co., ___ U.S. ___, 108 S.Ct. at 2409; see also Van Hoose v. Eidson, 450 U.S. 746 (6th Cir. 1971) (per curiam order). The notice of appeal filed in the present case states that "plaintiffs in the above case ... appeal..." and lists only as plaintiffs "Minority Employees of the Tennessee Department of Employment

Security, et al." Because plaintiffs Davis, Oliver and Perry are not designated in the notice of appeal as required by Torres,

It is ORDERED that the motion to dismiss is granted.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 81-3114
Judge Higgins

MINORITY EMPLOYEES OF THE TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, INC., et al.

v.

STATE OF TENNESSEE, DEPARTMENT OF EMPLOYMENT SECURITY, et al.

ORDER

In accordance with the memorandum contemporaneously filed, the objections (filed February 14, 1986) of the plaintiffs to the Magistrate's Report and Recommendation (filed January 31, 1986) are overruled. The objections (filed March 6, 1986) of the defendants to the Magistrate's finding of disparate treatment as to the plaintiff Davis and

disparate impact as to the plaintiffs Davis and Oliver are sustained. The plaintiffs' claims under Title VII are hereby dismissed.

It is so ORDERED.

/s/Thomas A. Higgins
Thomas A. Higgins
United States District Judge
9-3-86

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 81-3114
Judge Higgins

MINORITY EMPLOYEES OF THE TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, et al.

v.

TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, et al.

ORDER

Before the Court are the objections of the plaintiffs[1] to the Magistrate's Report and Recommendation filed January 20, 1988.

The Magistrate recommended that the

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[1] The objecting plaintiffs are Rosetta Davis, Alma Oliver, Hazel Perry and Minority Employees of the Tennessee Department of Employment Security, Inc. The objections were filed timely on February 22, 1988, pursuant to an extension of time granted by order entered February 11, 1988.

defendants'[2] joint motion for summary judgment (filed December 24, 1986) be granted.

In their first objection, the plaintiffs do not assail the Magistrate's application of the doctrines of res judicata and collateral estoppel to the facts at issue. Rather, the plaintiffs challenge the correctness of the underlying judgments. The Court finds this objection to be without merit, since it attempts to attack matters previously considered and decided.

Secondly, the plaintiff, Hazel Perry, objects to the Magistrate's recommendation as to the disposition of her claims on the

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[2] The defendants are the Tennessee Department of Employment Security; its former Commissioner, Robert J. Bible, in his official and individual capacities; the Tennessee Department of Personnel; and its former Commissioner, William C. Koch, in his official and individual capacities

ground that she has been deprived of "an opportunity to be heard in this Court on her claims." The Court finds this objection to be without merit, since the plaintiff Perry failed to present any evidentiary material in response to the defendants' properly supported motion for summary judgment on the issue of an alleged discriminatory delay in rehiring her.

After considering the Report and Recommendation, the objections and related pleadings, the Court finds that the findings and conclusions of the Magistrate are correct. The Report and Recommendation is adopted and approved.

The defendants' joint motion for summary judgment is granted. The plaintiffs' claims under 42 U.S.C. §§ 1981, 1983 and 1985, and the Thirteenth and Fourteenth Amendments are dismissed

with prejudice. The plaintiffs' pendent state law claims are dismissed without prejudice.

Accordingly, this action is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
3-9-88

No. 88-2128

Supreme Court, U.S.
FILED
JUL 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

MINORITY EMPLOYEES OF THE TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, INC., ROSETTA N. DAVIS, ALMA C. OLIVER AND HAZEL PERRY,

Petitioners,

v.

STATE OF TENNESSEE, DEPARTMENT OF EMPLOYMENT SECURITY, ROBERT J. BIBLE, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF EMPLOYMENT OF SECURITY, TENNESSEE DEPARTMENT OF PERSONNEL, WILLIAM C. KOCH, JR., COMMISSIONER OF PERSONNEL OF THE STATE OF TENNESSEE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Do the terms "Minority Employees of the Tennessee Department of Employment Security, Inc. et al." and/or "Plaintiffs in the above action" fail to satisfy the specificity requirement of Rule 3(c) of the Federal Rules of Appellate Procedure as to the petitioners, Rosetta N. Davis, Alma C. Oliver and Hazel Perry, resulting in no federal appellate jurisdiction over their claims?

PARTIES TO THE PROCEEDINGS BELOW

The petitioners in this action are Rosetta N. Davis, Alma C. Oliver and Hazel Perry. Minority Employees of the Tennessee Department of Employment Security, Inc. is a party to the proceeding before the United States Court of Appeals for the Sixth Circuit; however it is not a party to this Petition for Writ of Certiorari.[1] The respondents in this action are the Tennessee Department of Employment Security, Robert J. Bible, Commissioner of the Tennessee Department of Employment Security, Tennessee Department of Personnel and William C. Koch, Jr., Commissioner of the Tennessee Department of Personnel.

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[1] The United States Court of Appeals for the Sixth Circuit granted the respondents' Motion to Dismiss the petitioners, Rosetta N. Davis, Alma C. Oliver and Hazel Perry from the appeal for failure to specify the names of those individuals in the Notice of Appeal; however, since Minority Employees of the Tennessee Department of Employment Security, Inc., was designated as a party in the Notice of Appeal, the respondents filed no motion to dismiss as to Minority Employees of the Tennessee Department of Employment Security, Inc.

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No. 88-2128

In The

Supreme Court of the United States

October Term, 1988

MINORITY EMPLOYEES OF THE TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, INC., ROSETTA N. DAVIS, ALMA C. OLIVER AND HAZEL PERRY,

Petitioners,

v.

STATE OF TENNESSEE, DEPARTMENT OF EMPLOYMENT SECURITY, ROBERT J. BIBLE, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF EMPLOYMENT OF SECURITY, TENNESSEE DEPARTMENT OF PERSONNEL, WILLIAM C. KOCH, JR., COMMISSIONER OF PERSONNEL OF THE STATE OF TENNESSEE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's orders of February 28, 1989 and October 7, 1988 in this case. Those orders are not reported but are set forth at pages 1a-4a of the Appendix of the Petition for Writ of Certiorari.

JURISDICTION

The petitioners assert that this Court has jurisdiction to consider their Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1291. That particular statutory provision vests jurisdiction with courts of appeals to hear final decisions from district courts not jurisdiction for this Court to consider a petition for writ of certiorari from a court of appeal. Jurisdiction for this Court to consider a petition for writ of certiorari is pursuant to 28 U.S.C. § 1254(1) which provides that this Court may review cases in the federal courts of appeals by "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

PERTINENT RULES AND STATUTES

Rule 3(c) of the Federal Rules of Appellate Procedure:

> The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

28 U.S.C. § 1653:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

REASONS FOR DENYING THE WRIT

I.

THE ORDERS OF THE SIXTH CIRCUIT DATED FEBRUARY 28, 1989 AND OCTOBER 7, 1988 ARE IN ACCORD WITH THIS COURT'S DECISION IN THE *TORRES* CASE

In *Torres v. Oakland Scavenger Company*, 108 S.Ct. 2405 (1988), this Court was confronted with the question of "whether a federal appellate court has jurisdiction over a party who was not specified in the notice of appeal in accordance with Federal Rule of Appellate Procedure 3(c)." In that case, the petitioner, Jose Torres, was one of sixteen plaintiffs who had intervened in an employment discrimination suit in the United States district court for the district of California. Due to a "clerical error on the part of a secretary employed by the petitioner's attorney", Mr. Torres' name was left off the notice of appeal. *Id.* at 2407. In upholding the Ninth Circuit's dismissal of Mr. Torres' appeal for lack of jurisdiction under Rule 3(c), Justice Marshall, writing for the majority, stated as follows:

> [W]e find that the petitioner failed to comply with the specificity requirement of Rule 3(c), even liberally construed. Petitioner did not file the functional equivalent of a notice of appeal; he was never named or otherwise designated, however inartfully, in the notice of appeal filed by the 15 other intervenors. Nor did petitioner seek leave to amend the notice of appeal within the time limits set by Rule 4. Thus, the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal.

Id. at 2409.

In response to the petitioner's argument that the use of the term "et al." was sufficient to indicate his intention to appeal, this Court stated that:

> The use of the phrase 'et al.', which literally means 'and others', utterly fails to provide such notice to either intended recipient. Permitting such vague designation would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions. The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.

Id.

As in the *Torres* case, the petitioners, Rosetta N. Davis, Alma C. Oliver and Hazel Perry failed to be designated in the notice of appeal either in the caption or the body. Such a failure results in a lack of jurisdiction which the Sixth Circuit recognized in its order of October 7, 1988, stating that "[b]ecause plaintiffs Davis, Oliver and Perry are not designated in the notice of appeal as required by *Torres*, it is ordered that the motion to dismiss is granted." Petition for Writ of Certiorari, Appendix 4a.

The petitioners argue that the use of the phrase "otherwise designated" by this Court in the *Torres* opinion should open the door for the Sixth Circuit to make an inquiry as to whether the petitioners, Rosetta N. Davis, Alma C. Oliver and Hazel Perry were "otherwise designated" in the notice of appeal. The problem with this argument is that a review of the notice of appeal supports the decision of the Sixth Circuit to dismiss the petitioners' appeal. The pertinent language of the notice of appeal is

twofold. First, the caption states "Minority Employees of the Tennessee Department of Employment Security, Inc., et al.". Second, the body of the notice of appeal states "[n]ow come plaintiffs in the above case and appeal . . . ."

Whether taken separately or together, the language in these two pertinent portions of the notice of appeal in no way designates the petitioners, Rosetta N. Davis, Alma C. Oliver and/or Hazel Perry as appealing the district court decision. This Court in the *Torres* decision rejected the argument that the term "et al." was sufficient to designate Mr. Torres as an appellant. Likewise, the term "et al." is insufficient to designate the petitioners, Rosetta N. Davis, Alma C. Oliver and Hazel Perry as appellants from the district court to the court of appeals. As for the use of the term "plaintiffs" in the body of the notice of appeal, it is impossible to know which of the "plaintiffs" are being designated as appellants, especially in light of the fact that there are a total of four plaintiffs.

As for the petitioners' argument that the Sixth Circuit erred in not permitting them to amend their notice of appeal pursuant to 28 U.S.C. § 1653, such an argument fails due to the fact that the petitioners attempted to make such an amendment after the time for taking the appeal had expired. This Court in *Torres* noted that the petitioner did not "seek leave to amend the notice of appeal within the time limits set by Rule 4." *Torres*, 108 S.Ct. at 2409. Likewise, the petitioners' failure to amend their notice of appeal within the time prescribed results in the Sixth Circuit not having jurisdiction over that appeal.

II.

THE ORDERS OF THE SIXTH CIRCUIT DATED FEBRUARY 28, 1989 AND OCTOBER 7, 1988 ARE CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS RENDERED AFTER THIS COURT'S OPINION IN THE *TORRES* CASE

Subsequent to this Court's decision in the *Torres* case, a number of other circuits have rendered decisions which are in agreement that use of the term "et al." is insufficient to name or otherwise designate a party for purposes of a notice of appeal under Rule 3(c) of the Federal Rules of Appellate Procedure. *See Santos-Martinez v. Soto-Santiago*, 863 F.2d 174 (1st Cir. 1988) (the use of the phrase "et al." in the caption of the present appeal is inadequate to specify the plaintiffs who are actually appealing.); *Appeal of District of Columbia Nurses' Association*, 854 F.2d 1448 (D.C. Cir. 1988) (court lacks jurisdiction to entertain appeal from unnamed appellants based on the use of the term "et al."); and *Meehan v. County of Los Angeles*, 856 F.2d 102 (9th Cir. 1988) (the use of "et al." following Brian Meehan's name and notice of appeal does not sufficiently indicate an intention to appeal by Michael Meehan or Keith Mauldin).

The petitioners argue that the orders of the Sixth Circuit dated February 28, 1989 and October 7, 1988 are in conflict with the decision of another panel of the Sixth Circuit in the case of *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989). An internal conflict of decisions within a circuit is

not a ground for this Court to grant a petition for writ of certiorari.[2]

Although this Court has discretion to grant a petition for writ of certiorari from an interlocutory order as in this case, this Court has indicated that it "should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Company v. Jacksonville T. & K. Western Railroad Company,* 148 U.S. 372, 384 (1893). *See also Supreme Court Practice,* Stern, Gressman & Shapiro, § 4.18 (6th Ed. 1985). There is no extraordinary reason why this Court should grant this petition from an interlocutory order.

Finally, the respondents note that the Sixth Circuit rendered a final decision in this case on July 10, 1989 after the petitioners filed this petition for writ of certiorari. Moreover, the petitioners filed a petition for rehearing en banc[3] with the Sixth Circuit on July 21, 1989 raising the following issue before the en banc panel:

> Whether the panel erred in dismissing an appeal as to three of the four plaintiffs despite prevailing principles of liberal construction, the express provision of Rule 3(c), Federal Rules of Appellate Procedure which mandates '[a]n appeal shall not be

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[2] Rule 17 of the Supreme Court Rules sets forth the grounds to which this Court will look in granting a petition which include a conflict among the circuits and a question of federal law which has not been but should be settled by this court.

[3] The respondents have lodged a copy of the petition for rehearing en banc with the Clerk of the Supreme Court for the Court's convenience.

dismissed for informality of form or title of the notice of appeal', where the joint notice of appeal identified the Appellants as 'plaintiffs in the above case,' contained the typed name of one plaintiff followed by the phrase 'et al.' in the caption and made it clear that all the plaintiffs were appealing, and the panel reached the restrictive and erroneous conclusion that the designations 'plaintiffs in the above case' and 'et al.' in the notice of appeal actually mean only one plaintiff where this Court has issued a directly contrary ruling in the *Nicks* case.

The petitioners are now raising the same issue in their petition for rehearing en banc before the Sixth Circuit as they raise before this Court in their petition for writ of certiorari. Thus, the petition for writ of certiorari is premature and should be denied.

CONCLUSION

Based upon the foregoing authorities and analyses, the respondents respectfully urge this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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